

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>SHIRLEY MARTIN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,196
<b>HERITAGE FLOWERS</b>	)	
Respondent	)	
Uninsured	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund appeals from the Award entered by Special Administrative Law Judge William F. Morrissey on January 28, 1997. The Appeals Board heard oral argument on June 17, 1997.

**APPEARANCES**

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. Respondent appeared by its attorney, Jeffrey E. King of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, E. Thomas Pyle, III of Hutchinson, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

**ISSUES**

In its application for review, the Fund describes the issues as follows:

- “1. Whether the claimant’s aggravation or injury to her right upper extremity arose out of and in the course of her employment?
- “2. What is the nature and extent of claimant’s disability for her aggravation and injury to her left upper extremity?
- “3. Whether the respondent is entitled to a reduction in compensation for a prior compensable permanent injury?
- “4. Whether the respondent is entitled to the benefits of K.S.A. 44-567?
- “5. Whether the claimant suffered a wage loss?”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

- (1) Claimant has failed to establish by a preponderance of the credible evidence she sustained an aggravation or an injury to her right upper extremity arising out of and in the course of her employment.

Claimant worked for respondent as a floral designer. She also did loading, unloading, and delivery two days a week. She started working for respondent in December of 1993, and she testified that two to three weeks after starting she noticed numbness in her hands and arms. Claimant continued to work until January 26, 1994. Claimant had experienced problems with her hands and arms before she began working for respondent. While working for a previous employer, Pizza Hut, claimant underwent an ulnar nerve release by Dr. J. Mark Melhorn. She also had right carpal tunnel syndrome surgery by Michael P. Estivo, D.O. Claimant was off work for approximately one year between her employment at Pizza Hut and her employment for respondent.

As indicated, claimant testified that she experienced symptoms in both extremities while working for respondent. The Appeals Board finds, however, that claimant has not established that she sustained any permanent injury to the right upper extremity arising out of her employment for respondent. After leaving employment, claimant was treated first by Dr. Billings and then by Dr. Estivo. Dr. Estivo’s records show no complaints regarding the right upper extremity for approximately 15 months after claimant left employment for respondent. Dr. Billings did not testify, and the Appeals Board finds that his records, introduced at the preliminary hearing, are not part of the record to be considered on appeal.

Dr. Estivo ultimately testified that he could not say the symptoms claimant mentioned 15 months after her employment for respondent were the result of her employment for respondent. The Appeals Board finds this conclusion convincing in context.

(2) The Appeals Board finds that claimant is entitled to benefits for a 5 percent permanent partial general disability to the left upper extremity.

Several physicians testified regarding the nature and extent of the injury to claimant's left upper extremity. Dr. Estivo, the treating physician, testified claimant has a 10 percent permanent partial impairment to the left upper extremity, 50 percent of which preexisted the injury in this claim. Ernest R. Schlachter, M.D., gave a rating for thoracic outlet syndrome and then for a 15 percent impairment to each upper extremity for overuse syndrome with entrapment neuropathy of the ulnar nerve at the elbow and carpal tunnel syndrome. He also testified that he probably would have rated claimant as having a 10 percent impairment prior to the injury at issue here. The ratings by Drs. Estivo and Schlachter for the left upper extremity produce the same end result. K.S.A. 44-501(c) provides in pertinent part as follows:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Dr. Schlachter testified that he likely would have rated claimant's prior impairment at least as high as Dr. Melhorn's rating. Dr. Melhorn had rated the left upper extremity as having a 10 percent permanent partial impairment of function. When Dr. Schlachter's rating of 15 percent for the left upper extremity is reduced by a preexisting impairment of 10 percent, the result is 5 percent impairment for the current injury. As indicated, Dr. Estivo testified that 50 percent of his 10 percent rating would have preexisted. Based upon this testimony, the Appeals Board finds claimant is now entitled to benefits based upon a 5 percent permanent partial impairment to the left upper extremity.

(3) Respondent is not entitled to credit for payments made on a prior compensable injury.

K.S.A. 44-510a provides:

"If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury."

The above quoted provisions of K.S.A. 44-510a do not entitle respondent to a credit under the circumstances of this case. First, the prior disability has been accounted for by deducting that disability from the total disability to determine the amount of the benefits to be awarded in this case. The prior disability has not, therefore, contributed to the resulting disability awarded in this case. In addition, the evidence presented does not permit one to calculate the amount of weekly benefits for the prior disability. The evidence shows the total amount of the settlement on the prior claim but not the basis for that settlement. The Appeals Board, therefore, finds that respondent is not entitled to credit for amounts paid on the prior claim.

(4) The Appeals Board finds that respondent is entitled to benefits of K.S.A. 44-567 and that all of the award assessed in this case should be paid by the Kansas Workers Compensation Fund.

K.S.A. 44-567 establishes the criteria for imposing liability on the Kansas Workers Compensation Fund in cases where the respondent employs or retains a handicapped employee and that handicap causes or contributes to subsequent accident or injury for which benefits are awarded. The Special Administrative Law Judge applied these criteria to award all the compensation benefits and costs to be paid by the Kansas Workers Compensation Fund. Although the Appeals Board has determined that this case should be one for disability to the left upper extremity only, the Appeals Board affirms that 100 percent of those benefits should be paid by the Kansas Workers Compensation Fund. The evidence establishes respondent had knowledge of the preexisting impairment. The impairment would have been a handicap and the current injury would not have occurred but for the handicap.

The Fund argues that this particular respondent is not entitled to shift the liability to the Fund. The Fund points to the language in K.S.A. 44-567 which provides as follows:

“An employer who operates within the provisions of the workers compensation act . . . .”

The Fund contends that respondent did not operate “within the provisions of the workers compensation act” as it did not have the requisite insurance and was not a qualified self-insured. The Appeals Board disagrees with the statutory construction urged by the Fund. The Appeals Board does so principally because it gives a very specific meaning to the very general language. The Appeals Board concludes that such a specific intent would most likely have been specifically expressed. The Appeals Board concludes that the general intent expressed here is to make the provisions of K.S.A. 44-567 applicable to all employers to whom the Workers Compensation Act applies. The Appeals Board also notes that this specific circumstance, i.e. employers not covered by workers compensation insurance, is addressed in K.S.A. 44-532a. While the statutory construction urged by the Fund is not inconsistent with K.S.A. 44-532a, the fact the legislature has dealt specifically with liability in cases of insolvent employers leads the Appeals Board to conclude that if the legislature had intended to exclude insolvent and uninsured employers from operation of

K.S.A. 44-567, the legislature would have more specifically so stated in the language of K.S.A. 44-567. The Appeals Board, therefore, finds and concludes that respondent is entitled to the benefits of K.S.A. 44-567 and, as applied here, the Kansas Workers Compensation Fund should be liable for 100 percent of the benefits awarded.

(5) The Fund has raised issues concerning claimant's wage loss. Those issues have become moot in light of the finding that the award in this case is limited to a scheduled injury.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated January 28, 1997, should be, and is hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Shirley Martin, and against the respondent, Heritage Flowers, and Kansas Workers Compensation Fund for an accidental injury which occurred January 26, 1994, and based upon an average weekly wage of \$262.02 for 13.86 weeks of temporary total disability compensation at the rate of \$174.69 per week or \$2,421.20, followed by 9.81 weeks at the rate of \$174.69 per week or \$1,713.71, for a 5% permanent partial disability to the left upper extremity, making a total award of \$4,134.91, all of which is presently due and owing.

The Appeals Board approves and adopts all other orders made in the Award by the Administrative Law Judge not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Jeffrey E. King, Salina, KS

E. Thomas Pyle, III, Hutchinson, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director